

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 September 2003

BALCA Case No.: 2002-INA-197
ETA Case No.: P2000-CA-09497127/ML

In the Matter of:

AMREP, INC.,

Employer,

on behalf of

GERARDO HERRERA,
a/k/a HERRERA GERARDO,
a/k/a GERARDO HERRERA SEGURA,¹
Alien.

Appearance: Eduardo Vigil, Representative
Ontario, CA

Certifying Officer: Martin Rios
San Francisco, CA

¹ The ETA 750A form requests the following information: "Name of Alien (Family name in capital letter, First, Middle, Maiden)." (AF 22). Therefore, the Employer should have entered the Alien's last name, in capital letters, and then the Alien's first and middle names. Since the Employer entered "GERARDO HERRERA" on the ETA 750A form (AF 22), the CO reported the Alien's name as "Herrera Gerardo. (AF 7,18). However, the Alien signed the ETA 750B form as "Gerardo Herrera. (AF 80). Furthermore, the documents submitted in support of the Alien's application include duplicate copies of a letter, dated January 22, 1998. As translated into English, which refers to the work experience of "Mr. Gerardo Herrera Segura." (AF 82-85). In view of the foregoing, we have listed all three alternative names above. However, throughout the balance of this Decision and Order, we will refer to the above person simply as "Gerardo Herrera" and/or as the "Alien."

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Gerardo Herrera ("Alien") filed by AMREP, Inc. ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On January 29, 1998, the Employer, AMREP, Inc., filed an application for labor certification to enable the Alien to fill the position of "Truck Body Builder," which was classified by the Job Service as "Truck Body Repairer." (AF 22). The job duties for the position, as stated on the application, are as follows:

To welds (sic) metal parts, using gas welding equipment as specified by layout, welding diagram, or work order: Positions parts in jigs or fixtures on bench or floor, or clamps parts together along layout marks. Selects torch, torch tip, filler rod and flux, according to welding chart specifications or type and thickness of metal. Constructs and repairs metal truck bodies and trailers according to specifications, using handtools and power tools: Lays out dimensions on metal stock, such as sheet metal and angle iron, using square, rule, and punch. Fits and assembles components, using handtools and portable power tools, such as drill, riveter, and welding apparatus. Welds together body parts and braces.

(AF 22). The stated requirement for the position is one year experience in the job offered or in the related occupation of "Welder." (AF 22).

In a Notice of Findings ("NOF") issued on December 11, 2001, the CO proposed to deny certification on the grounds that the Employer had rejected U.S. workers for other than lawful, job-related reasons. In so finding, the CO cited two sub-issues: 1) U.S. applicants were rejected based upon an undisclosed requirement and, 2) Employer's recruitment effort was inadequate (AF 18-20). On or about January 7, 2002, the Employer submitted its rebuttal. (AF 9-16). The CO found the rebuttal unpersuasive and issued a Final Determination, dated March 5, 2002, denying certification on the above grounds. (AF 7-8). On or about April 4, 2002, the Employer filed a request for review of the Final Determination/ (AF 1-6). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. On June 19, 2002, the Board issued a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief." A copy of the foregoing Order, which had

been mailed to the Alien under the name of “Herrera Gerardo” was returned by the U.S. Postal Service marked “ADDRESSEE UNKNOWN RETURN TO SENDER.” On August 1, 2002, the Board issued another Order directing the Employer to submit to the Board the Alien’s current mailing address; and, confirming that this is an active appeal, in which Employer is still sponsoring alien labor certification on behalf of the Alien. In correspondence dated August 5, 2002, the Employer provided the Alien’s current address, and stated that it “is still sponsoring the alien labor certification on behalf of Mr. Gerardo Herrera.” In view of the foregoing, we will consider this case on its merits.

DISCUSSION

Under 20 C.F.R. §656.21(b)(6), an employer must document that U.S. applicants were rejected solely for lawful job-related reasons. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant’s qualifications.

Although the regulations do not explicitly state a “good faith” requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are “able, willing, qualified and available” to perform the work. 20 C.F.R. §656.1.

The report of recruitment results, dated March 10, 2000, signed by Employer’s owner, Jose Ghibaudo, set forth the stated reasons for not hiring any of 6 U.S. applicants. (AF 27-28). Of the foregoing, only two were considered on the merits (*i.e.*, Joseph Palazzola and Jason D. Cook). They were purportedly rejected for lacking a specific type of welding experience and for failing a welding test. (AF 27,29). Regarding the remaining U.S. applicants (*i.e.*, James V. Castro, Arturo A. Yanez, Roger E. Cunningham, Roman J. Martinez), the Employer stated that none of them qualified “based

on lack of interest” and/or “based on lack of punctuality and interest.” (AF 27-28).

In the NOF, the CO stated that the Employer had relied upon an unstated requirement (*i.e.*, the nine techniques set forth on the welding test) as the basis for rejecting qualified U.S. workers Cook and Palazzola. Accordingly, the CO directed the Employer to “[s]how that the U.S. workers who applied are not qualified based on their failure to possess the requirements set forth on the ETA 750 A.” (AF 19). In addition, the CO stated, in pertinent part, that the “evidence also shows you did not conduct a good-faith recruitment effort. The recruitment is considered tardy and incomplete.” Therefore, the CO instructed the Employer to “submit a rebuttal addressing the issue and giving details of your attempt(s) to interview the U.S. applicants.” (AF 19-20).

The Employer’s “Rebuttal of Findings” (AF 10-11), dated January 7, 2002, states in pertinent part:

Undisclosed Requirements:

The fact that we did not mention in our ad that there would be a welding test is not considered by us as unfair to the applicants. It is our practice to administer a welding test to anyone applying for a welding position to find out the extent of his or her welding abilities. Our welding test is very basic and is administered by one of our Certified Welders, Angel Mariscal.

Mr. Jason Cook...

Outcome: Mr. Cook does not have truck-body building experience as noted on his resume under Skills and Training. Therefore, he does not qualify based on the job requirements stated in our ad and furthermore, he failed to pass the welding test that was administered. Declined.

Mr. Joseph Palazzola.

Outcome: Mr. Palazzola does not have experience in truck-body building. His resume stated that Utility Trailer employed him from 2/81 to 9/85 as a welder. He stated to us that his job consisted of repair jobs only. Therefore, he did not qualify based on the job requiring the ability to do construction welding as well as repair welding. Furthermore, he failed to pass the welding test that was administered. Declined.

Insufficient Recruitment Efforts:

In your findings, you stated that our recruitment effort should be considered “tardy” and “incomplete”....I received from Job Services six resumes on February 10, 2000 and on February 17....I sent out the interview notice letters to the applicants as is clearly demonstrated by the “Certified” return receipts...Therefore, our response should not be considered tardy...

You also pointed out the fact that we omitted our telephone number. We do not feel that omitting our telephone number was unreasonable because the applicant was instructed to mail their resumes to Job Services, which in turn were submitted to our office for review. We received a total of six referrals from the Employment Development Department. I interviewed two of the applicants and the other four failed to attend the interview as stated in the letter. This would seem to indicate that there was sufficient information for the candidates to submit themselves for consideration if that was their desire.

(AF 10).

In the Final Determination, the CO found the Employer’s rebuttal unpersuasive (AF 7-8). In

pertinent part, the CO stated:

1> We note you neither submitted a copy of the test at the time of the application nor at the time of rebuttal; we still do not know its content. We also have no information whether the alien had to pass it to qualify. Your rebuttal, then, admits the ETA750A does not state all your actual minimum requirements; your petition is non-compliant with regulations and labor certification cannot be approved.

2> Five (sic)² of six qualified applicants did not show at the interview; this shows to us a lack of good-faith in your recruitment effort. Scheduling all six to show up at once without giving them the option of rescheduling if they had a conflict shows to us a lack of a good-faith effort to recruit U.S. workers, too...In sum, the evidence is not convincing you made a good-faith effort to recruit U.S. workers.

(AF 8). We agree.

Regarding the “Undisclosed Requirements” sub-issue, the Employer’s “rebuttal” is that Mr. Cook was rejected because he lacked “truck-body building experience” and failed the welding test. Similarly, the Employer stated it had rejected Mr. Palazzola for lack of experience in truck-body building, the lack of “construction welding” experience, and failing the welding test. (AF 10) However, as outlined above, the Employer’s only stated requirement is one year of experience in the job offered as a “Truck Body Builder,” *or one year experience in the related occupation of welder*. (AF 22). (Emphasis added). Furthermore, the Employer made no distinction between types of welding experience (*e.g.*, “construction welding” versus “repair welding”). Accordingly, it was improper to reject U.S. applicants Cook and Palazzola on that basis, since they clearly met the stated alternative welding experience. (AF 37-38, 49). The only remaining reason cited by the Employer for rejecting Messrs. Cook and Palazzola is that they failed the welding test.

² As stated in the report of recruitment results and rebuttal, *four* of the six U.S. applicants were not interviewed by Employer.

We have held in some cases that if U.S. applicants fail an appropriate test, they may be lawfully rejected. For example, where a valid test was given to an alien and U.S. applicants, which was designed by an accounting expert with prior experience devising such tests, and the expert indicated the foundation for the test questions, and why a 70% score was a reasonable cutoff for minimally qualified applicants, U.S. applicants who failed the test were found lawfully rejected. *See Commercial Property Management*, 1993-INA-163 (Aug. 25, 1994); *see also South of France Restaurant*, 1989-INA-68 (Feb. 26, 1990). However, we have also held that pre-employment tests with a subjective determination have a potential for abuse, and therefore must be supported by specific facts to provide an objective, detailed basis for concluding that the applicant could not perform the core job duties. Accordingly, where an Employer failed to provide such objective, detailed basis for validating the pre-employment test, we found that certification was properly denied. *See Lee & Family Leather Fashions, Inc.*, 1993-INA-50 (Dec. 21, 1994)(where the panel affirmed the denial of certification because the employer failed to provide objective, detailed grounds for its conclusion that a U.S. applicant could not satisfactorily design handbags based on the pre-employment test).

In the present case, the Employer provided the conclusions of Angel Mariscal, a certified welder, who simply listed various types of welding and noted "Pass," "Fail," or "Marginal" regarding the efforts of Messrs. Cook and Palazzola. In summary, Mr. Mariscal's overall assessment was to fail both of the foregoing U.S. applicants based upon the purported inability "to perform various types of welding required at Amrep." (AF 29). However, Mr. Mariscal failed to provide objective, detailed grounds for his conclusions. Furthermore, the Employer failed to provide any evidence that the Alien took and passed the same pre-employment test now required of the U.S. applicants. It is well settled that, in addition to providing objective reasons for rejecting U.S. applicant based upon a pre-employment test, an employer must also show that the alien took and passed the test before being hired. *See, e.g., Lee & Family Leather Fashions, Inc., supra; Sentient Sys., Inc.*, 1994-INA-519 (Jan. 23, 1996); *Kevry Corp., d/b/a D & D Stainless, Inc.*, 1994-INA-393 (June 29, 1995). Accordingly, we affirm the CO's determination that the Employer rejected U.S. applicants Cook and Palazzola based upon unstated requirements.

Finally, even assuming the Employer had lawfully rejected U.S. applicants Cook and Palazzola, we would affirm the CO's denial of certification based upon the Employer's insufficient recruitment efforts. Although we accept the Employer's assertion on rebuttal that it had mailed out its certified letters to the six U.S. applicants in a timely fashion, we nevertheless find that the Employer's actions demonstrate a lack of good faith. As noted by the CO, the Employer assigned the same date and time for all of the U.S. applicants to be interviewed. Furthermore, as stated by the CO, the Employer discouraged the U.S. applicants from rescheduling the interview time by failing to even provide a telephone number in the letters. Moreover, the Employer failed to provide the U.S. applicants adequate time to respond to its contact letter concerning the interviews.

The record reveals that all the certified letters sent by Employer are dated February 16, 2000 (AF 36,41,43,52,58,64), but that they were actually mailed on February 17, 2000 (AF 12). U.S. applicants Cook, Palazzola, and Castro received the letter on February 18, 2000. However, Mr. Cunningham did not receive the letter until February 24, 2000; and, Mr. Yanez received it on February 28, 2000. (AF 33-34).³ Since each applicant was instructed by the Employer to be available for an appointment on February 21, 2000 at 7:00 a.m., the *maximum* number of days for the U.S. applicants to respond to the Employer's contact letter was three days. Although two of the applicants appeared for the appointment, we find that the Employer could not assume that an applicant's failure to appear and/or respond within such a short time period establishes a lack of interest and grounds for rejection. (AF 27-28). See, e.g., *Tempco Engineering, Inc.*, 1988-INA-101 (June 20, 1988); *Michael Alex*, 1990-INA-414 (Dec. 9, 1991); *Galletti Brothers Food*, 1990-INA-511 to 1990-INA-516, 1990-INA-531 to 90-INA-566 (Apr. 30, 1991). This is especially true regarding the Employer's rejection of U.S. applicants Cunningham and Yanez, who did not even receive the Employer's letter until *after* the date of the scheduled interview. Moreover, the Employer acknowledges that Mr. Yanez specifically called to try to reschedule the interview, but that he was rebuffed by the Employer and rejected "based on lack of punctuality and interest." (AF 4,27,33).⁴

³ It is unclear when, or if, U.S. applicant Martinez received the Employer's letter. (AF 12; *compare* AF 33-34).

⁴ We note that the return receipt form provided by Employer establishes that U.S. applicant Arturo Yanez received the contact letter from the Employer on February 28, 2000 (AF 33); however, Employer stated that he actually called on February 25, 2000, but was told that "no tests were being rescheduled." (AF 4; *See also* AF 27).

In summary, the Employer rejected qualified U.S. workers based upon unstated job requirements, and Employer also failed to demonstrate a good faith recruitment effort. Accordingly, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the